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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOSEPH T. PONDER and
JUDY L. PONDER, - - - - - - *Petitioners*

versus

UNITED STATES OF AMERICA - - *Respondent*

On Petition for Writ of Certiorari
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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December 2, 1997

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7,688

QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioners, married service personnel, discriminated against as individuals, by the Air Force, and the application of 37 U.S.C. Section 403, when they were denied individual compensation when they applied for housing compensation?

2. Is 37 U.S.C. Section 403(b), as purportedly implemented by DoDPM Table 3-2-1, unconstitutional, inasmuch as it provides different treatment without due process hearings to similarly situated members of the armed forces and occupants of government quarters in determining housing entitlements?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Military Duty and Related Responsibility	3
B. Housing Compensation Received	4
C. Administrative Review	5
1. Mr. Ponder's Claim	5
D. Litigation Procedural History	7
1. U.S. Court of Federal Claims Decision	7
2. U.S. Court of Appeals for the Federal Circuit Decision	8
REASONS FOR GRANTING THE WRIT	8
A. A Grave Injustice to Many Persons Who Defend Their Country	8
B. Military Culture Demands More Change to Accept Women as Active Duty	9
C. A Question of National Importance: Is an Employer's Applying Different Rules for Employees and Employee's Dependents For the Same Benefit Dissimilar Treatment for Similarly Situated Persons?	10
D. Apparent Conflict with Prior U.S. Supreme Court Decisions	13
E. Apparent Conflict Between Appellate Courts	16
CONCLUSION	17
APPENDIX	1a-52a

TABLE OF AUTHORITIES

PAGE

Cases:

Day v. *U.S.*, 611 F. 2d 1124 (1980) 16
Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 13, 14, 15
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 5, 15
Lischak v. *U.S.*, 202 Ct. Cl. 598 (1973) 12
Mumma v. *U.S.*, 99 Ct. Cl. 261 (1943) 12
Planned Parenthood of Missouri v. *Danforth*, 428 U.S. 52 (1975) 13, 14
Railway Express Agency v. *New York*, 336 U.S. 106 (1949) 13
True v. *U.S.*, 107 Ct. Cl. 662, 69 F. Supp. 128 12

Statutes and Rules:

Fifth Amendment to the U.S. Constitution 7, 8
Career Compensation Act of 1949 ..... 10, 11, 12
Women's Armed Forces Act of 1948 12
37 U.S.C. Section 403(a) 7, 15
37 U.S.C. Section 403(b) 16, 17
37 U.S.C. Section 420 15

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---

PETITION FOR WRIT OF CERTIORARI

Joseph and Judy Ponder respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit

OPINIONS BELOW

The opinion of The Comptroller General (App., *infra*, 17a-20a) is reported at 1994 U.S. Comp. Gen. LEXIS 271, March 4, 1994.

The opinion of the United States Court of Federal Claims (App. *infra*, 10a-16a) is unreported.

The opinion of the United States Court of Appeals for the Federal Circuit (App. *infra*, 1a-9a) is unreported.

BASIS FOR JURISDICTION

(i) June 26, 1997, date United States Court of Appeals for the Federal Circuit issued decision upholding judgment of the Court of Federal Claims against petitioners.

(ii) September 4, 1997, date the United States Court of Appeals for the Federal Circuit denied petitioners' petition for rehearing.

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment to the United States Constitution provides in pertinent parts, that:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

37 U.S.C. Section 403 (1982) provides, in pertinent parts, that:

> (a)(1) Except as otherwise provided by law, a member of the uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates prescribed in accordance with section 1009 of this title or as otherwise prescribed by law, according to the pay grade in which he is assigned or distributed for basic pay purposes.
>
> (2)(a) A member of a uniformed service entitled to basic allowance for quarters is entitled to a variable housing allowance...whenever assigned to duty in an area of the United States (other than Alaska or Hawaii) which is a high housing cost area with respect to such member...
>
> (b) Except as otherwise provided by law, a member of the uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his

grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.

37 U.S.C. Section 420 (1982) provides that:

A member of a uniformed service may not be paid an increased allowance under this chapter, on account of a dependent, for any period during which that dependent is entitled to basic pay under section 204 of this title.

37 U.S.C. Section 101 (25)(1987) states:

The term "regular compensation" or "regular military compensation "RMC)" means the total of the following elements that a member of a uniformed service accrues or receives, directly or indirectly, in cash or in kind every payday: basic pay, basic allowance for quarters (any variable housing allowance or station housing allowance) basic allowance for subsistence; and Federal tax advantage accruing to the aforementioned allowances because they are not subject to income tax.

37 U.S.C. Section 401 (1982) provides:

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried child;

(3) his parent...who is in fact dependent on the member for over one-half of his support; however the dependency of such parent is determined on the basis of an affidavit submitted by the parent and any other evidence...

STATEMENT OF THE CASE

A. Military Duty and Related Responsibility

From September 1, 1985 through November 6, 1988, petitioners, Joseph and Judy Ponder, husband and wife, were on active duty in the United States Air Force stationed at the Strategic Air Command (SAC) installation,

Grand Forks Air Force Base in North Dakota. They were both commissioned officers. Grand Forks AFB consisted of two main units, a bomber wing and a missile wing, with several smaller detachment units. Mr. Ponder transferred to this base as a Lieutenant Colonel selectee and the third most senior in his squadron. He moved up the ranks becoming chief of the bomb wing's largest and most active division for all flight operations personnel, later chief of the Wing's Command Post, the nerve center of all operations, and then special Assistant to the Director of Flight Operations.

Ms. Ponder was transferred to the base to be the senior contracting line manager, the senior technical expert, and the only military contracting officer authorized to sign contracts of "unlimited" dollar value, with twenty-four hour contracting responsibility. Both Ponders served in the stead of their commanding officers who were required to live on base. Both Ponders worked considerable duty outside normal duty hours, often 80-hour-plus workweeks.

B. Housing Compensation Received

Military regulations allowed either of the petitioners to choose, and to choose between themselves, who would claim their child as dependent for housing compensation purposes. The Ponders perceived that their military duties, including competing with peers, a lack of adequate housing near the base, extreme weather with impassable road conditions, and lack of suitable child-care off base gave them no choice but, even though they were not officially ordered, to live on base.

In September 1985, Ms. Ponder, claiming their child as a dependent, qualified for and was assigned to government family quarters designated adequate for one field grade officer with dependents. As this was "in-kind" quarters for with-dependent rate BAQ and VHA for her grade of major,

the Air Force stopped her BAQ and VHA cash payments. Mr. Ponder co-occupied the same quarters with his wife and child, and received no separate housing compensation in his own right-neither BAQ, VHA cash payments or bachelor quarters according to his rank.

This cutting off of Mr. Ponder's housing compensation was based solely on DODPM Table 3-2-1, Note, (App., *infra*, 49a-52a) which provides that when family-type quarters are jointly occupied by the married service members, neither member is entitled to BAQ or VHA payments. No due process hearings or evaluation of all occupants in government quarters were held to show facts and conclusions as to why Mr. Ponder's situation dictated such treatment.

C. Administrative Review

1. MR. PONDER'S CLAIM

On April 11, 1986 Mr. Ponder filed a claim for his housing entitlement, namely without-dependent BAQ and VHA at his then current rank of major, which exceeded that for which Ms. Ponder was separately entitled and was receiving. He requested the regulations be changed accordingly.

His claim was based on contentions that (1) he was statutorily entitled to regular military compensation, including the BAQ and VHA or in-kind housing provisions, in his own right, separate from his wife, based on his separate rank and military status; (2) the quarters he co-occupied with his wife were inadequate compared to the combined adequacy standards to which both he and his wife were statutorily entitled; (3) it was inequitable and a violation of due process to withhold two occupants regular compensation only for two-member and not one-member families; (4) deprivation of his statutory entitlement was violation of substantive and procedural due process similar to that in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); (5)

the government benefited from increased productivity and quicker response time to emergencies-no small consideration at a SAC base-by having more members per housing unit including the petitioners' living on base. (App., *infra*, 31a-48a)

Mr. Ponder argued the quarters were inadequate based on many criteria, including (1) the monthly estimated fair market value of about $400 was substantially less than, and "in-kind" to, both petitioners' statutory BAQ and VHA entitlements of $1149; (App. 35a) (2) the square footage of their quarters reduced by over one-half as a result of cutting off one member's housing compensation caused them to have store an automobile, about one-fourth of their households, and another fourth was inaccessible in an unfinished basement. (App., *infra*, 36a, 37a)

On September 10, 1986 the Military Pay Entitlements & Systems Branch, returned the claim without action based on a legal opinion from Headquarters, U.S. Air Force, Fiscal Law Division, Office of the Staff Judge Advocate.

On August 27, 1987, Ms. Ponder filed a formal suggestion to request the U.S. Air Force correct false annual "Personal Statements of Military Compensation." She said they were false on the grounds that the Ponders' statements reflected they were receiving the value of BAQ and VHA or in-kind quarters in their own rights, independently of each other, when, in fact, they were not. On or about January 23, 1988, Headquarters, U.S. Air Force, denied the request, stating that the statements comply "... with the intent of Congress...member-married-to-member are residing in military quarters the government essentially values at two BAQs."

Ms. Ponder on January 7, 1988, formally suggested that the government entice more two-member families with dependents to live in government quarters, by offering them one-member's without-dependent BAQ, thereby improving

productivity and saving millions in VHA. On May 5, 1989 the Air Force denied this request saying "it was against the law."

Within approximately a month after completing retirement moves, on March 24, 1993 the Ponders appealed these decisions to the U.S. Comptroller General. This was denied by Comptroller General Claims Group on July 12, 1993. They appealed to the Comptroller General on August 12, 1993, and this was denied by Robert P. Murphy, Acting General Counsel on March 4, 1994.

D. Litigation Procedural History

1. TRIAL COURT: U.S. COURT OF FEDERAL CLAIMS

The Ponders initially filed a law suit in the United States District Court for the Western District of Kentucky where U. S. District Judge Charles Allen ordered that the case be transferred to the United States Court of Federal Claims. A new Complaint was filed with the U.S. Court of Federal Claims on December 1,1995. The Complaint alleged (1) the Air Force denied them regular military compensation (BAQ and VHA or in-kind housing according to their ranks and whether with dependents) as entitled by 37 U.S.C Section 403 in violation of the 5th Amendment to the U.S. Constitution, (2) they had been denied their right to an accurate Personal Statements of Military Compensation, (3) that conspiracies for said denials existed, and (4) that said denials and conspiracies had disparate impact on service women. (App., *infra*, 23a-30a) They requested injunctive and declaratory relief, for the Court to declare unconstitutional military regulations that prohibit a second military spouse from receiving housing compensation independent of the first spouse, and for the court to declare 37 U.S.C. Section 403 (a) guarantees every active duty member of the Armed Forces regular military compensation, including the BAQ or in-kind quarters provisions, to be determined and paid separate from a military spouse. (App., *infra*, 28a, 29a)

Two hearings were held. The government moved to dismiss the Ponder's Complaint pursuant to RCFC 12 (b)(4) and plaintiffs responded with a motion for summary judgment. The Court granted the government's motion to dismiss stating that the law did not require on-base housing units and off-base housing payments to be "perfect economic equivalents." "...it is a member's rank and a member's need—'adequate for himself, or his dependents, if with dependents'—that are the only determinants in the assignment of military housing; equivalency to private market value (as measured by BAQ payments) is not a factor." (App., *infra*, 14a, 15a) The plaintiffs appealed to the U.S. Court of Appeals for the Federal Circuit.

2. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECISION

Petitioners appealed, saying that they never said or requested that their entitlements be based on adequacy standards of "perfect economic equivalents." On June 26, 1997, the Court of Appeals for the Federal Circuit held that the Ponders "were not deprived of a cognizable property right," (App., *infra*, 7a) and therefore they did not have a valid due process clause under the 5th Amendment and there was no equal protection violation because "section 403 is gender neutral on its face and in its application to this case." (App., *infra*, 8a) That Court affirmed the judgment of the Court of Federal Claims. A Petition for Rehearing and request for Rehearing en banc was denied on September 4, 1997. (App., *infra*, 21a) Hence, the herewith Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

A. Grave Injustice to Many Persons Who Defend Their Country

Lt. Col. Joseph Ponder, USAF, Ret. and Major Judy Ponder, USAF, Ret. have been penalized from receiving individual entitlements because they both served their coun-

try in the military profession and happened to be married to each other as husband and wife. This Court should grant their Petition for Writ of Certiorari to correct this injustice that was committed against them and untold numbers of others like them. Today, about 93,000 men and women in the U.S. Armed Forces are married to someone in the military. Their careers and ability to defend their country is directly related to their decision on how far away from their peers and their jobs they must live.

B. Military Culture Demands More Change to Accept Women as Active Duty

The present cultural atmosphere that this case arises in is most important for the Court to appreciate. As the Court of Appeals correctly stated, "In this case we confront yet another facet of the on-going process of adjustment in the military services as a result of the presence of both men and women serving on regular active duty." (App., *infra*, 2a) The Appeals Court accurately recognized that the statute written for a different time and for a different culture, now provides different treatment to the Petitioners and today tens of thousands of similar two-member families where this "anomaly, created perhaps by the fact that when the rules were written they were written with the image of housing for one member with a spouse and dependents, rather than two service members married to each other." (App., *infra*, 7a) The Court should find this "anomaly" which discriminates and punishes petitioners is so outdated and obsolete that it no longer serves a rational purpose for which the law was enacted, namely to provide a fair pay and benefits scheme on a competitive basis with civilian industry, and therefore is unconstitutional.

This Court should review this case to determine whether 37 U.S.C. Section 403 as applied to the Petitioners, and many others, needs "adjusting" and "updating" because of the current reality of giving formal recognition to female

service members that has come about since the 1949 Career Compensation Act was enacted. In the Comptroller General's opinion denying Mr. Ponder's claim, no reason for the different treatment was set forth. They merely stated, "The statutory rule is long-standing and clear...The current codification of the rule is based on section 302(b) of the Career Compensation Act of *1949*, 63 Stat. 812-813, although it was enacted from an earlier statute." (emphasis added) (App., *infra*, 18a)

C. A Question of National Importance: Is an Employer's Applying Different Rules for Employees and Employees' dependents for the Same Benefit Dissimilar Treatment for Similarly Situated Persons?

The Air Force picks and chooses when it wants to treat married members as two labor units verses one married unit. The military treats all members as two individuals in paying basic pay, in ordering members to duty in remote, combat, and/or distant parts of the world away from their dependents and families, in requiring temporary and long-term emergency plans for care of dependents in case both parents get so ordered to duty, and in the number of lives the members may have to sacrifice for military duty.

All members, except the petitioners' case, are treated as individuals for housing compensation. All regular military compensation is paid to members as individual members, except the petitioners' case. While the Air Force treats petitioners as "one family unit" in housing, the Air Force required petitioners to pay two full sets of dues to be two individual Officers' club members. While the military treats two-member petitioners claiming a dependent in government family quarters as "one family unit" (denying petitioners two individual entitlements), the military treats the one-member family in the same quarters next door as "two individual units." The government gives the one-

member family both in-kind quarters for the housing portion of the military member's regular military compensation plus separately gives the civilian working spouse her regular (civil service or other) civilian compensation.

While the statute cites rank and whether with dependents as criteria for "individual" housing entitlements, and while the military treats petitioners as "two individual units" under that criteria for off-base quarters opt for BAQ and VHA cash payments, the military treats petitioners as "one family unit" via the "family size" adequacy criteria. The military treats petitioners as "two individual units" when petitioners live off base, but as "one family unit" when petitions opt to live on base in quarters "in kind" to their BAQ and VHA.

The best rationale for allowing the different treatment, trial and Appeals Courts said, was that it was the Ponders' election to live on base. (App., *infra*, 8a, 11a) In actuality, this is not rationale in support of the statute or of the different treatment, just an explanation of how the statute applied to the petitioners, just a contention that petitioners had an alternative.

This Court should take judicial notice that the military's own senior leaders at the October 18, 1997, dedication of the "Women in the Military Service Memorial" Dedication ceremony offer rationale that support petitioners' claim that they should be treated in their own measure according to their contribution to society:

> "America's women in uniform...they've been there in the times...when their numbers were arbitrarily restricted...under strict quotas...They've served times when their pay and benefits were unequal and when their service has not been clearly valued in equal measure...the service of every woman shall be valued in full measure...and that is not an act of grace, or compassion, or of generosity, but is rather her entitlement as a member of our nation's family and of our

nation's military." Mr. Togo West, Secretary of the Army.

"Women want life, liberty, and the pursuit of happiness, the right to serve our country, to bear arms in our nation's defense. They want respect for the red badge of courage...They want recognition for their dedication and sacrifice...they want what men have always wanted, have been given, and have too long deferred...the nation expresses its gratitude for what it has for more than two centuries taken for granted." Secretary of Defense William Cohen.

Unfortunately, the new military has not changed all its regulations to keep up with the new military and new laws that allow husband and wife to both defend their country by military service. The Career Compensation Act enacted in 1949 was limited by the Women's Armed Services Act of 1948, PL 625, which had established a two percent ceiling on the number of women in the regular services, and until the 1960's, women rarely exceeded one percent of service members. The increase in the number of two-member couples like petitioners mirrors the increase in the number of female service members.

If the Appeals Court had recognized the petitioners as two individual units, the Court would have granted petitioners the same treatment as other individual members: the same consideration as the Court of Claims granted officers in *Lischak* v. *U.S.*, 202 Ct. Cl. 598 (1973); *Mumma* v. *U.S.*, 99 Ct. Cl. 261 (1943); *True* v. *U.S.*, 107 Ct. Cl. 662, 69 F.Supp 128, namely that government quarters that were barely adequate for one officer's share, could not be adequate for two or more officers' shares (key word, "shares") of those quarters, such quarters were consequently deemed inadequate, and the officers sharing said quarters were entitled to back pay of full BAQ without deduction for the value of said inadequate quarters. The Court of Claims in *Lischak* declared that assignment to

appropriate and adequate quarters is prerequisite to cutting off that right to BAQ, and the regulation was invalid to the extent that it authorized or justified denial basic allowance for quarters for admittedly inadequate quarters. In this case, since the quarters did not measure up to the combined adequacy standards of both petitioners, and since neither petitioner by sharing their quarters with another officer received their full share of entitlement, both petitioners received less than their share of entitlement and bother were provided inadequate quarters.

D. Apparent Conflict with Prior U.S. Supreme Court Decisions

The military's not treating petitioners as two individual units constitutes dissimilar treatment for married versus unmarried personnel, which has not been approved by this Court. Where there was no rationale to meet the statute's objective or to rationally explain the different treatment, this Court held that regulations for such violate the Equal Protection Clause of the Fourteenth Amendment. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972; *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1975). In *Eisenstadt*, the Court found: "...the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." (cites omitted) at p. 453. In closing this Court echoed the famous statement of Mr. Justice Jackson, concurring in *Railway Express Agency* v. *New York*, 336 U.S. 106, 112-113 (1949)(decided the same year of the applicable statute here, the 1949 Career Compensation Act):

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the

> door to arbitrary action so effectively as to allow those officials to *pick and choose only a few to whom* they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (emphasis added) at p. 454.

The Court ruled in *Planned Parenthood* that government must treat even married couples as individuals, not as a unit.

Eisenstadt mirrors the contours and breadth of the ideological shift that has supported changes in the American family and in American family law during the past several decades. This shift has moved from a world in which domestic relations are founded in a hierarchical ideology that manifests natural differences in actual relationships between men and women to a new world in which domestic relations are based in an egalitarian ideology that presumes the autonomy of the individual within a world of contract. *Eisenstadt* transferred the right of privacy from the family unit to the individuals who make up that unit. It extended to individual family members the ideology of autonomous individualism, historically a philosophical foundation of western civilization. The language in *Eisenstadt* indicates that the law should disregard the distinction between home and work and that families are the individuals that compose them. Marriage, formerly viewed as a sacred unit, family or marital unit per se, now became an "association of two individuals" who will receive equal protection. The bottom line is that *Eisenstadt* recognized the changing character of the American family. Rightly or wrongly, the family is increasingly defined in terms of the market and to the extent that families require legal protection, that protection increasingly attaches to individual family members and not to the family unit as an undivided

and indivisible whole. *Eisenstadt* envisions the autonomous individual at the center of the domestic unit.

American family law has changed to recognize this new reality. Family law, at least in relations between adults, has abandoned tradition almost completely and has amalgamated family law with contract, tort, and property law. For instance, antenuptial agreements, as recently as 25 years ago were universally dismissed, are today readily accepted and legal.

In the very next calendar year after *Eisenstadt*, this Court in 1973 ruled in *Frontiero* v. *Richardson, supra*, that also for BAQ, it was violation of procedural and substantive due process to require female service members to have to report and prove dependence for their civilian husbands when male members were not so required to make the same reports and roof, and that administrative convenience was not sufficient rationale for the different treatment. The same unequal application of a presumption of dependency for similarly situated persons in *Frontiero* surfaces in the instant case: the government's only reason for different treatment for petitioners versus one-member families in government family quarters is the same false presumption of dependency, which Frontiero ruled as not rationale.

In the present case, 37 U.S.C. Section 403(a) clearly gives housing compensation entitlement to individual members. 37 U.S.C. 420, which denies a member from claiming another member who is also entitled to BAQ and VHA for the purpose to get the higher "with dependent" rate BAQ, reinforces the interpretation that the entitlement to BAQ and VHA is to an individual entitlement. However, the military by regulation gives entitlement to all military members and to all government quarters occupants based on the individual, except for petitioners and other military members in their same situation. Is there some ground of

difference that rationally explains the different treatment under 37 U.S.C. Section 403? Section 403(b) simply says a service member assigned to government housing "...is not entitled to a basic allowance for quarters." Not only is there no rationale for different treatment discussed nor has any been presented in the entire record of this case. The statute was not written for intended different treatment. The housing statute gives no indication that its intent was to treat service members married to each other as "one family unit" instead of individual units and thereby cut off the entire housing portion of regular military compensation entitled by one member. Little help can be found in the government's contention that disallowing Mr. Ponder's request for BAQ "is reasonable and consistent with applicable federal statutes."

E. Apparent Conflict Between Appellate Courts

It appears petitioners' claim would have succeeded in the U.S. Court of Appeals for the Fifth Circuit. In *Day* v. *U.S.*, 611 F.2nd1124 (5th Cir. 1980), that Court struck down the military's contention that any housing the military provides is adequate per se. *Day* held that the BAQ/housing statute did not empower the military or the President to write regulations to prescribe that any quarters occupied rent-free at officer's permanent station shall be deemed appropriate and adequate. That to suspend payment of BAQ if political or military exigencies made it difficult to provide what was adequate and appropriate, or to accomplish the same result by the sprinkling of a few regulatory words, or to make regulations arbitrarily defining what is adequate and appropriate by no standard at all. *Day* held that when quarters provided were not appropriate and adequate, based on a reasonable, consistently applied defini-

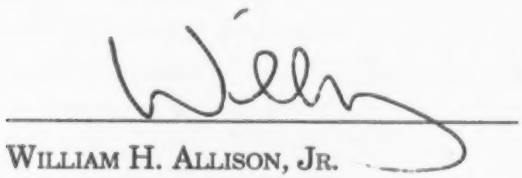
tion of each, the member shall be granted BAQ. In the present case, the Appeals Court decision is implicitly consistent with *Day* by not accepting the government's contention that it could arbitrarily set no standard of adequacy and appropriateness for individuals in petitioners situation, and consequently, the Appeals Court, in fact, found that the petitioners' quarters were inadequate. However, the Appeals Court in this case, by offering as rationale that the petitioners had a choice to live off base, failed to demand the government pay the BAQ and VHA when the government failed to provide housing the Court found as inadequate.

CONCLUSION

In the eyes of the law, petitioners are entitled to be treated as individuals, in spite of their marriage, with separate rights to the housing provision of regular military compensation. 37 U.S.C. 403(b), as implemented by DODPM Table 3-2-1 , does not treat petitioners as individual military members, "picks and chooses" different rules—provides dissimilar treatment—for military members who are similarly situated.

The Court should grant petitioners' Petition for Writ of Certiorari and right this wrong by: (1) Declaring that the Ponders' statutory entitlement to BAQ or in-kind quarters according to consistently applied adequacy criteria may not be denied based on a DOD regulation purporting to authorize said denial, and by (2) Ordering the government pay petitioners BAQ and VHA according to both members' ranks, with either member at the higher rate BAQ.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

97-5040

JOSEPH T. PONDER,
JUDY L. PONDER, - - - - *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA, - *Defendant-Appellee.*

Appealed from: United States Court of Federal Claims

Joseph T. Ponder and *Judy L. Ponder*, pro se, of Crestwood, Kentucky.

Lydia K. Griggsby, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, and *Anthony H. Anikeeff*, Assistant Director. Of counsel was *Maj. Kevin Greenfield*, Trial Attorney, Military Personnel Branch, Air Force General Litigation Division, United States Air Force.

Judge Wiese

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

97-5040

JOSEPH T. PONDER,
JUDY L. PONDER, - - - - *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA, - *Defendant-Appellee.*

DECIDED: June 26, 1997

Before NEWMAN, PLAGER, and SCHALL, *Circuit Judges.*
PLAGER, *Circuit Judge.*

In this case we confront yet another facet of the ongoing process of adjustment in the military services as a result of the presence of both men and women serving on regular active duty. The issue here relates to a military member's entitlement to housing, and how that entitlement is affected when two members share government provided housing. Appellants are Major Judy L. Ponder, United States Air Force (Retired), and Lt. Col. Joseph T. Ponder, United States Air Force (Retired) (collectively the "Ponders" or "appellants"). They appeal a decision of the United States Court of Federal Claims dismissing their complaint for failure to state a claim upon which relief can be granted. Because appellants received all that they were entitled to under the law, we affirm.

BACKGROUND

In order to understand the present dispute, a brief discussion of military pay is required. Many military bases

have on-base housing facilities. This housing is provided rent free to qualifying military members. Members who do not occupy government-provided housing are entitled to a pay allowance in lieu of housing called a "Basic Allowance for Quarters" or "BAQ" for short. *See* 37 U.S.C. § 403 (1994).

For each pay grade there are two different BAQs—one for service members without dependents and another for those with dependents. *See* 37 U.S.C.A. § 1009 note (Supp. 1997). The with-dependents housing allowance is paid at a single rate based on the member's pay grade regardless of the number of dependents. *Id.* For purposes of calculating the appropriate BAQ, a spouse who is a service member is not considered a dependent. See 37 U.S.C. § 401 (1994). Thus, a BAQ is determined by two factors—rank, because pay grade is a proxy for rank, and family. In order for the BAQ to more accurately reflect the cost of obtaining alternative housing, the BAQ can be scaled up depending on the cost of living in the area. *See* 37 U.S.C. § 403a (1994). This adjustment is referred to as a "variable housing allowance" or "VHA." *Id.*

Two married service members living together off-base are each entitled to BAQ at the without-dependent rate, unless one has a dependent. *See Senior Airman Calvin S. Watford, Jr.*, 1996 WL 345581, at *2 (Comp. Gen. June 24, 1996). In the event one has a dependent, one can receive a with-dependent BAQ and the other a without-dependent BAQ. *Id.* Two married members living together off-base cannot receive two with-dependent BAQs even if each has their own children from a prior marriage *see Chief Warrant Officer Ronald C. Hull*, 62 Comp. Gen. 666, 667 (1983), although two married members living apart due to their military assignments can under some circumstances receive two with-dependent BAQs, *see, e.g., Majors Steven and Karen Niqq*, 1993 WL 104895, at *2 (Comp. Gen. March 30, 1993) (citing cases). This latter case is the exception, however, and not the rule. Most significant for the present case is the military's rule that when two mar-

ried members occupy government-supplied housing neither can receive BAQ. *See Department of Defense Personnel Manual*, Table 3–2–4, Note 1 ("When family-type quarters are jointly occupied by the members neither member is entitled to BAQ"); *see also* 37 U.S.C. § 403(b)(1) (1994).

With this background in mind we turn to the facts of the present case. Appellants, husband and wife, are former officers of the United States Air Force. Both are now retired from service. Previously, from 1985 to 1988, while still serving in the Air Force, they were both stationed at Grand Forks Air Force Base in North Dakota. At the Ponders' election they lived together, with their daughter, in government-provided, on-base housing. In so doing they elected not to receive one with-dependent BAQ and another without-dependent BAQ, as was their right.

After several months, on March 24, 1986, Lt. Col. Joseph Ponder filed a claim with his military commander seeking payment of a without-dependent BAQ. The basis of his claim was that he should be entitled to a BAQ allowance without regard to the fact that his wife and child had on-base housing, which he shared. Major Judy Ponder also filed a request, asking the Air Force to correct the Ponders' "Personnel Statements of Military Compensation," which indicated that both Ponders were receiving the value of BAQ or in-kind quarters. Her contention, like her husband's, was that his pay records improperly reflected the receipt of a housing allowance since she was the only one receiving the equivalent of BAQ. Both claims were denied by the Air Force.

The Ponders were separated from active duty in 1990. On April 1 of that year, they renewed their claim for BAQ and VHA by filing with the Comptroller General of the United States. That claim was denied. As stated by the Comptroller General:

> [A] member assigned to government quarters appropriate for his rank and adequate for his family is not entitled to BAQ. Moreover, . . . government quarters occupied by a member and his dependents without

> payment of rent "shall be deemed to have been assigned to such member a.s appropriate and adequate quarters and no BAQ shall accrue to such member..."

Lieutenant Colonel Joseph T. Ponder, 1994 WL 101057, at *1 (Comp. Gen. March 4, 1994).

Undaunted, the Ponders proceeded to file a class-action law suit in the United States District Court for the Western District of Kentucky, where they were then living. The Ponders alleged two counts for violations of their due process rights under the Fifth Amendment. In addition to injunctive relief, they requested "[a]ward of past due compensation in the form of without dependent rate BAQ and VHA ... in the sum of $43,662" and correction of "personnel statements of military compensation." The government moved to dismiss or, in the alternative, to transfer to the United States Court of Federal Claims. The district court chose the latter, reasoning that the Ponders' claim was essentially one for military back pay, which can only be brought in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (1994), citing *Mitchell* v. *United States*, 930 F.2d 893, 896 (Fed. Cir. 1991).

The Ponders fared no better before the Court of Federal Claims. After oral argument, the government filed a motion to dismiss for failure to state a claim upon which relief can be granted. *See* RCFC 12(b)(4). The Ponders responded with their own motion for summary judgment. The trial judge granted the government's motion and denied the Ponders'. They now appeal that dismissal to this court.

DISCUSSION

The Ponders' complaint requests without-dependent BAQ and VHA for the time period in which Lt. Col. Ponder lived rent-free with his wife, then-Major Ponder, in government-supplied housing at Grand Forks Air Force Base. This is a claim for military back pay for which the Court of Federal Claims has jurisdiction under the Tucker Act. *See Mitchell*, 930 F.2d at 896; *see also Brant* v. *United States*,

597 F.2d 716, 717 (Ct. Cl. 1979) (adjudicating a claim for BAQ). We have appellate jurisdiction over this case since it involves an appeal from a final decision of the Court of Federal Claims. *See* 28 U.S.C. § 1295(a)(3) (1994).

We review judgments of the United States Court of Federal Claims to determine whether they are premised upon clearly erroneous factual determinations or otherwise incorrect as a matter of law. *See Wheeler* v. *United States*, 11 F.3d 156, 158 (Fed. Cir. 1993); *Transamerica Ins. Corp.* v. *United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992). Because failure to state a claim under Rule 12(b)(4) is a question of law, we review that decision without deference to the trial court's determination. *See* Wheeler, 11 F.3d at 158.

Dismissal under Rule 12(b)(4) is appropriate only when it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitled him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Trauma Serv. Group* v. *United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). On review, as in the trial court, we must accept the plaintiff's factual allegations in the complaint as true, drawing all inferences in favor of the plaintiff. *See* 2 *Moore's Federal Practice*, § 12.34 (3d ed. 1997). Because granting such a motion summarily terminates the case on its merits, courts broadly construe the complaint, particularly in light of the liberal pleading requirements under the Federal Rules of Civil Procedure. *Id.*

The gravamen of appellants' complaint is straightforward. They point to the provision in 37 U.S.C. § 403(a)(1), which entitles each of them to receive BAQ independent of the other:

> Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters in accordance with section 1009 of this title or as otherwise prescribed by law, according to the pay grade in which he is assigned or distributed for basic pay purposes.

37 U.S.C. § 403(a)(1) (1994). However, the statute further provides:

> a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.

37 U.S.C. § 403(b)(1) (1994).

Under the facts as alleged in his complaint, Lt. Col. Ponder lived in "quarters of the United States." Accordingly, under the clear mandate of the statute, it would appear that he is not entitled to a BAQ. The Ponders respond that this creates an anomaly. Had they lived off base, they each would have been entitled to a BAQ. By accepting on-base housing, they in effect have only the housing to which either one of them would have been entitled. Admittedly that is an anomaly, created perhaps by the fact that when the rules were written they were written with the image of housing for one service member with a spouse and dependents, rather than two service members married to each other. The anomaly, however, may be paying two service members living together off-base twice what one service member with a family, living off-base, would receive.

However that may be, the statute is clear. The acceptance of government provided housing vitiates any claim for a separate BAQ. *See* 37 U.S.C. § 403(b)(1). Because appellants were not deprived of a cognizable property right, they cannot make out a claim under the due process clause of the Fifth Amendment. *See Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.")

Lt. Col. Ponder argues that a system that exchanges two off-base allowances for one government-provided house

cannot be what was intended. At the least, two married members should be entitled to twice the housing that one member would get, and since they did not have such quarters, the compensating mechanism should be a BAQ for one of them. The simple answer to that argument is that it was the Ponders' election to live on base. There is no showing that the quarters were not "appropriate to his grade, rank, or rating and adequate for himself, and his dependents." *See* 37 U.S.C. § 403. Appellants do not allege the quarters provided were inappropriate given Major Ponder's rank or inadequate for her and her family. Appellants' contention that they were forced to make a Hobson's choice between accepting lesser on-base housing or compromising their careers because they could not get to work as fast, is without merit. There is no requirement that even government-supplied housing be within a specific distance of a member's work site.

Appellants' equal protection claim is equally unavailing. The main thrust of appellants' argument is that section 403 impermissibly distinguishes between male and female service members, citing *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). The appellants' reliance on *Frontiero* is misplaced. That case dealt with disparate treatment between male and female service members for purposes of obtaining increased quarters allowances and medical and dental benefits. The Supreme Court held that such disparate treatment, requiring female service members to prove dependency but not male service members, was a violation of the equal protection clause of the Fifth Amendment. *Id.* at 690. In contrast, section 403 is gender neutral on its face and in its application to this case. As a result, appellants have failed to state a claim under the equal protection clause of the Fifth Amendment.

CONCLUSION

The judgment of the Court of Federal Claims is AFFIRMED.

COSTS

Costs to the government.

IN THE

UNITED STATES COURT OF FEDERAL CLAIMS

Action No. 95-695 C

JOSEPH T. PONDER,
JUDY L. PONDER, - - - - - *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, - - *Defendant.*

ORDER—Granting Defendant's Motion to Dismiss and Directing Entry of Judgement Dismissing Complaint

Plaintiffs, husband and wife, are former officers of the United States Air Force—respectively, lieutenant colonel and major—both now retired from military service. They bring this suit to recover a housing pay supplement which they contend was improperly denied them while they were serving at Grand Forks Air Force Base in North Dakota—their last joint duty station prior to their retirement.

The case is now before the court on defendant's motion to dismiss for failure to state a claim on which relief can be granted and plaintiff's motion for summary judgement. The matter has been fully briefed and oral argument was heard on October 22, 1996. At the conclusion of the oral argument, the court announced its decision in defendant's favor. We repeat here the basis for our decision.

I

During the period relevant to this suit, 1985-1988, then Lieutenant Colonel Joseph Ponder and his wife, Major Judy Ponder, were stationed at Grand Forks Air Force Base, North Dakota, where they were living, with their daughter, in Government-provided, on-base housing. This hous-

ing, which was provided to the Ponders at their election, was rent-free and was offered to them in lieu of the pay supplement each was authorized to receive under 37 U.S.C.A. § 403 (West Supp. 1996)—the "basic allowance for quarters" that is provided to members of a military service to cover the cost of off-base living accommodations.

On March 24, 1996, several months after their assignment to Grand Forks Air Force Base, plaintiffs initiated the action that is now before this court. On that date, Lieutenant Colonel Ponder filed a claim with his military command seeking payment of a basic allowance for quarters measured at the "without-dependent" rate. The thrust of Colonel Ponder's claim was that each member of a uniformed service is entitled to his or her own housing allowance, whether that allowance be in cash or in kind. Therefore, in the case of a two-member military family, one member's receipt of Government-provided housing should not disqualify the other member from receiving a basic allowance for quarters. Hence, in his claim, Lieutenant Colonel Ponder wrote: "Request I be paid without-dependent rate BAQ [basic allowance for quarters] retroactive to 1 Sep. 85 when I first occupied government quarters with my wife who was, and is, already entitled to the same in her own right."

Following the submission of Lieutenant Colonel Joseph Ponder's claim, Major Judy Ponder also filed a claim challenging the Air Force's treatment of housing allowances. Specifically, on August 22, 1987, Major Ponder filed a request asking the Air Force to correct the Ponders' individual "Personnel Statements of Military Compensation" in which their military compensation was reported as including their individual receipt of the value of BAQ or in-kind quarters. Major Ponder's position, like her husband's, was that the on-base housing in which the couple resided represented only her individual housing allowance. Hence, she contended, no portion of that allowance should be counted as compensation received by her husband.

Neither of the Ponders' claims received a favorable response. On September 10, 1986, after a review of Joseph Ponder's claim by the Air Force's Active Duty Fiscal Law Division, Office of Staff Judge Advocate, the Air Force returned the claim without action. Similarly, on January 23, 1988, the Air Force denied Judy Ponder's request for corrections of records, stating that "[The personnel statement] complies with the intent of Congress . . . member-married-to-member are residing in military quarters the government essentially values at two BAQs."

The Ponders separated from active duty with the Air Force in 1990—he on March 30th of that year and she on August 30th. On April 1, 1993, they filed their claim for separate housing allowances with the Comptroller General of the United States. The claim was denied on July 12, 1993. An appeal followed. On March 4, 1994, the Comptroller's office issued a written opinion (B-254646) denying the Ponder's claim. That opinion provides, in part, as follows:

> The statutory rule is long-standing and clear: a member assigned government quarters appropriate to his rank and adequate for his family is not entitled to a BAQ. 37 U.S.C. § 403(b). The current codification of the rule is based on section 302(b) of the Career Compensation Act of 1949, 63 Stat. 812-813, although is was reenacted from an earlier statute. The same limitation is clearly stated in the Act's legislative history. See S Rep. 773, 81st Cong., 1st Sess. 20-21; H. Rep. 779, 81st Cong., 1st Sess. 32. Moreover, Executive Order 11,157, 29 Fed. Reg. 7973 (1964), specifies that government quarters occupied by a member and his dependents without payment of rent 'shall be deemed to have been assigned to such member as propriate and adequate quarters, and no BAQ shall accrue to such member' except in very limited situations not relevant here.

1994 U.S. Comp. Gen. LEXIS 271 at *3.

Following rejection of their claim by the Comptroller General, plaintiffs brought suit in this court.

II

Title 37 of the United States Code, section 403, establishes the pay entitlement that is at issue here. The opening paragraph of this section, § 403(A)(1), provides that "[e]xcept as otherwise provided by law, a member of a uniformed services who is entitled to basic pay is entitled to a basic allowance for quarters. . . ." In its subsequent paragraphs, section 403 goes on to enumerate qualifications on the allowance for quarters, the first of these being that "a member . . . who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, or his dependents, if with dependents, is not entitled to a basic allowance for quarters." 37 U.S.C. § 403(b).

In the presentation of their claim, plaintiffs do not take issue with what the statutory scheme makes evident: that a member's benefits include the value of housing, provided either in cash or in kind. Rather, the point plaintiffs draw from the statute is that the housing allowance is an individual entitlement. And it is this individual entitlement which plaintiffs maintain has been ignored by the military in its assignment of on-base housing to two-member military families.

In substantiation of this position, the Ponders offer two arguments. First, they contend that the housing they were assigned at Grand Forks Air Force Base was identical to the housing assigned to a single-member military family (of like rank) with two dependents. In their view, appropriate recognition of their dual-member family status should have required their assignment to housing better in quality than that assigned to the single member. That their housing was essentially the same as that assigned to a single members with two dependents means, to the Ponders, that only one member's housing needs were actually

taken into account in determining their housing assignment. Joseph Ponder's housing entitlement, they claim, was disregarded.

In contrast to their on-base housing situation, the Ponders point out as their second argument that, had they chosen to live off-base, each would have received a basic allowance for quarters—one measured at the "with dependent" rate, the other at the "without dependent" rate—the combined dollar amount of which would have substantially exceeded the corresponding BAQ payment to a single-member family with dependents. Thus, from the Ponders' point of view, the "decline" in housing quality that accompanies the dual-member family's election to accept on-base housing in lieu of off-base housing payments underscores the fact that on-base housing is calculated without regard to the housing entitlement of both members.

The court agrees with plaintiffs that each member of a uniformed service is entitled to his or her own allowance for housing, to be provided either in kind or in cash. However, the court does not agree with the contention that Joseph Ponder received no housing allowance. The problem with that contention—as evidenced by the arguments mustered in support of it—is that it proceeds from an incorrect premise: that on-base housing units and off-base housing payments must be perfect economic equivalents. The law expresses no such requirement, either in statute or in regulation.

As noted earlier, under the statute that is controlling here, 37 U.S.C. § 403(b), Government-provided housing for the military is defined as housing that is "appropriate to [a member's] grade, rank, or rating and adequate for himself, or his dependents, if with dependents." As these words make plain, it is a member's rank and a member's need—"adequate for himself, or his dependents, if with dependents"—that are the only determinants in the assignment of military housing; equivalency to private market value (as measured by BAQ payments) is not a factor.

Thus, the only real question in the case is whether the Ponders were assigned housing that fulfilled their separate statutory entitlements. The answer is yes. As was explained to the court during the oral argument of the case, in their assignment of housing, the military services distinguish between service members with nonmilitary spouses and service members married to one another. In the single-member families, the civilian spouse is treated as a dependent. And, in that situation, the quality of the housing that is assigned is based or the individual service member's rank plus the number of dependents that will be occupying the same quarters. In contrast, in dual-member families—where, by definition, neither member is a dependent of the other—the housing assignment reflects the sum of two individual entitlements. Thus, in the Ponder's individual entitlement plus Judy Ponder's "with dependent" entitlement.

Although the assignment "scheme" differs between the two situations, the end result in the same: assignments guided by rank and need result in two-member families with one dependent (the ponders' situation) occupying the same size quarters as one-member families with two dependents. The court sees no disregard of Joseph Ponder's housing entitlement is such a result.

Nor is evidence of such a disregard to be found in the fact that the Ponders' on-base housing was arguably of lesser market value that the off-base housing they could have acquired through their dual BAQ entitlements. Even assuming the factual correctness of this assertion, the test of the sufficiency of on-base housing is whether it is appropriate to a member's rank and adequate to a member's need, not whether its market value corresponds dollar-for-dollar to what could be secured through BAQs.

III

The Ponders have failed to demonstrate any entitlement to additional compensation from the Air Force attrib-

utable to an alleged shortfall in housing compensation. Accordingly, the court (i) grants defendant's motion to dismiss the complaint for failure to state a claim on which relief can be granted, and (ii) denies plaintiffs' motion for summary judgment. The Clerk is directed to enter judgment dismissing the complaint.

/s/ John P. Wiese
Judge

1ST CASE OF LEVEL 1
PRINTED IN FULL FORMAT

MARCH 4 1994 PGS. 43-45

Matter of: Lieutenant Colonel Joseph T. Ponder, USAF (Retired)—Claim for Basic Allowance for Quarters

B-254646

Comptroller General of the United States

1994 U.S. Comp. Gen. LEXIS 271

March 4, 1994

HEADNOTES:

[*1]

An Air Force officer occupied quarters with his wife, who was also an Air Force officer, and their dependent daughter. Neither received a Basic Allowance for Quarters (BAQ). His claim for BAQ is denied because a member occupying government quarters without payment of rent is not entitled to BAQ.

OPINION BY: MURPHY

OPINION:

DECISION

This is in response to an appeal of a Claims Group settlement denying the claim of Lieutenant Colonel Joseph T. Ponder, USAF (Retired), for a Basic Allowance for Quarters (BAQ) during the time he occupied government quarters while still on active duty at Grand Forks Air Force Base (AFB), North Dakota. We affirm the settlement.

Under 37 U.S.C. § 403 (a), a member who is entitled to basic pay is entitled to a BAQ. However, 37 U.S.C. § 403 (b) provides that a member who is assigned to government quarters without payment of rent is not entitled to a BAQ. Colonel Ponder is married to Major Judy L. Ponder, USAF

(Retired). From August 1985 until November 1988 they resided in government quarters at Grand Forks AFB with a dependent child. Neither he nor his spouse was paid BAQ.

In arguing that it is wrong that [*2] neither member is his situation is paid a BAQ, Col. Ponder maintains that while the provision of rent-free government quarters may affect one spouse's entitlement to a BAQ, the other spouse has an entitlement in his or her own right. In support, Colonel Ponder cites our Office's statement at 56 Comp. Gen. 46, 48 (1976), that "An entitlement to BAQ accrues to every member regardless of sex or grade by virtue of his or her status as a member of the uniformed services if quarters are not provided by the Government." Colonel Ponder argues that he therefore should have received a BAQ because the quarters at Grand Forks were assigned to his wife.

Colonel Ponder also cites in support of his claim Frontiero v. Richardson, 411 U.S. 677 (1973), where the Supreme Court held that male and female members must be treated equally with regard to the dependency of their spouses.

Finally, Colonel Ponder points out that not only do members married to each other not residing in government quarters receive a BAQ under section 403 (a), but under 37 U.S.C. § 1009, which authorizes the adjustment of compensation [*3] (including BAQ), some members living in government housing in fact do receive at lease a partial BAQ.

We are not persuaded by Colonel Ponder's arguments.

The statutory rule is long-standing and clear: a member assigned government quarters appropriate to his rank and adequate for his family is not entitled to a BAQ. 37 U.S.C. § 403 (b). The current codification of the rule is based on section 302 (b) of the Career Compensation Act of 1949, 63 Stat. 812-813, although it was reenacted from an earlier statute. The same limitation is clearly stated in

the Act's legislative history. See S. Rep. 733, 81st Cong., 1st Sess. 20-21; H. Rep. 779, 81st Cong., 1st Sess. 32. Moreover, Executive Order 11, 157, 29 Fed. Reg. 7973 (1964), specifies that government quarters occupied by a member and his dependents without payment of rent "shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no BAQ shall accrue to such member" except in very limited situations not relevant here.[1]

[*4]

Colonel Ponder's position is that each married member is entitled to an independent appropriate/adequate determination, and the fact that government quarters are occupied by a married couple therefore should not be an element in both of them. The purpose of BAQ, however, is to reimburse a member for the expenses incurred in procuring housing when government quarters are not provided. When a member occupying government quarters does not incur such expenses—which was Colonel Ponder's case—there are none for a BAQ on the basis Colonel Ponder proffers. See Special Agent Michael W. Zigmud, OSI, USF, B-199728, May 8, 1981.

The assigned quarters in this case were deemed adequate by the Air Force. Colonel Ponder does not allege that the quarters were inadequate by military standards, but rather that the quarters were inadequate by his standard of non-government housing he could secure if he and his wife were entitled to BAQ. This has no bearing on entitlement to BAQ under the law and regulations.

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[1]Determinations of adequacy are made by the member's base commander. See Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) paragraph 30222a.

Our statement at 56 Comp. Gen, 48 does not support Colonel Ponder. Our point that every [*5] member is entitled to a BAQ was, as indicated in the statement itself, directed at situations where "quarters are not provided by the Government." [2] That statement is entirely consistent with 37 U.S.C. § 403 (e) and with the application of section 403(b) to the Ponders.

Frontiero v Richardson also does not support the Colonel. That decision addressed the disparate treatment accorded male and female service members regarding the dependency status of civilian spouses. Before Frontiero, civilian female spouses were presumed to be dependents, while the financial dependence of civilian male spouses had to be proved. In Frontiero, the court held that male and female members must be treated equally with regard to the dependency of their spouses. In the present situation, both members of dual-service couples are treated the same. Neither spouse may claim the other as a dependent under 37 U.S.C. § 421, and both [*6] lose entitlement to BAQ when they occupy family-type government quarters.

Colonel Ponder is correct that members who occupy government quarters may receive partial BAQ, pursuant to the adjustment authority of 37 U.S.C. § 1009. Such payment, however, is limited to certain members without dependents who live in single-type government quarters. See DODPM para, 30214. We specifically pointed out in 57 Comp. Gen. 194, 198 (1977), in considering section 1009, that a member occupying family-type government quarters is not entitled to partial BAQ under that authority.

The Claims Group's settlement is affirmed.

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[2] We were contrasting that situation with entitlement to a dislocation allowance, which does not similarly accrue automatically, but instead is triggered by a specific event (moving and relocating a family).

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on September 11, 1997.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: September 4, 1997

By /s/ Alex Van Veen
Staff Law Clerk

cc: Joseph T. Ponder
Lydia K. Griggsby

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5040

JOSEPH T. PONDER,
JUDY L. PONDER, - - - - *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA, - *Defendant-Appellee.*

JUDGEMENT—Issued as a mandate on 09-11-97

On Appeal from the U.S. Court of Federal Claims
In Case No(s). 95–CV–695

This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: AFFIRMED

DATED JUN. 26, 1997 ENTERED BY ORDER
OF THE COURT

/s/ Jan Horbaly, Clerk

IN THE

UNITED STATES COURT OF FEDERAL CLAIMS

Action No. 95-695C

JOSEPH T. PONDER,
JUDY L. PONDER, - - - - - - *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, - - - *Defendant.*

COMPLAINT—Filed Dec. 1, 1995

COMPLAINT

Come the Plaintiffs, Joseph T. Ponder and Judy L. Ponder and for their Complaint state:

NATURE OF THE ACTION

1. This action seeks declaratory, injunctive, and equitable relief and money damages against the United States under applicable United States law.

2. Plaintiffs assert the following claims for relief in this action:

a. Count I– Deprivation of Fifth Amendment Due Process.

b. Count II– Conspiracy to Deprive Plaintiffs of Fifth Amendment Due Process

JURISDICTION

3. This Court has jurisdiction of Counts I and II of this matter pursuant to 28 U.S.C. § 2501 *et seq,*; 28 U.S.C. § 1331, via the Declaratory Judgment Act, 28 U.S.C. § 2201; the Administrative Procedures Act, 5 U.S.C. § 702;

and 37 U.S.C. § 403. *See Bowen* v. *Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722, (1988); *Hubbard* v. *E.P.A.*, 949 F.2d 453 (D.C. Cir. 1991). This action was initially filed *pro se* in the United States District Court for the Western District of Kentucky at Louisville, Civil Action No. 3:95CV–188A. By Memorandum Opinion and Order entered August 4, 1995, Hon. Charles M. Allen, Senior United States District Judge, ordered the within cause transferred to the United States Court of Federal Claims. This complaint is incident to such order and the order of this court.

PARTIES

4. Plaintiff, Joseph T. Ponder ("Joseph Ponder"), an adult citizen of the United States, is a resident of Oldham County, Kentucky, located in the Western District of Kentucky. At all relevant times herein he was commissioned by the United States Department of the Defense, United States Air Force, as a field-grade officer, first as a major, then as a lieutenant-colonel, and was married to Judy L. Ponder.

5. Plaintiff, Judy L. Ponder ("Judy Ponder"), an adult citizen of the United States, is a resident of Oldham County, Kentucky, located in the Western District of Kentucky. At all relevant times herein she was commissioned by the United States Air Force as a major, and was married to Joseph L. Ponder.

6. The United States of America, acting by and through its Department of Defense and Department of the Air Force, is the Defendant in this action.

ALLEGATIONS COMMON TO ALL COUNTS

7. The provisions of 37 U.S.C. §403 (a) allow military members entitled to basic pay to also draw Basic Allowance for Quarters ("BAQ"). BAQ is part of a member's Regular Military Compensation ("RMC"). 37 U.S.C. §101 (25). A member entitled to BAQ is entitled to variable housing allowance ("VHA"). 37 U.S.C. § 403 (a) (1). Under

37 U.S.C. §403, military members are entitled to BAQ when housing is not provided in-kind.

8. From September 1, 1985, through November 6, 1988, Judy Ponder, was on active duty in the United States Air Force, and was entitled to BAQ and VHA or in-kind government housing for her rank of Major and dependency status. During the same period, Joseph Ponder was on active duty in the United States Air Force, and was entitled to BAQ and VHA or in-kind government housing for his rank and dependency status. One of the Plaintiffs was also entitled to claim their daughter as a dependant and have BAQ and VHA increased to the "with-dependant" rate. Plaintiffs had the right to choose which member would claim defendants for BAQ purposes.

9. During the period from August 29, 1985, to November 4, 1988, the Ponder family occupied government family quarters of the type designated for a field-grade officer with defendants. Judy Ponder claimed a dependant and forfeited with-dependent BAQ at the Major's rate for in-kind/field-grade government family quarters. Defendant refused to compute or pay Joseph Ponder any housing compensation (without-dependant BAQ and VHA at the Major and later Lieutenant Colonel rate, or in-kind single quarters), independently of that which Defendant paid his spouse.

10. Defendant's failure to pay Joseph Ponder BAQ and VHA or in-kind housing in his own right, independently from that of his spouse's entitlement, was based on the Department of Defense Personnel Manual, Table 3–2–4, Note 1:"When family-type quarters are jointly occupied by the members neither member is entitled to BAQ..."

11. On April 11, 1986, Joseph Ponder filed a claim for without-dependent BAQ and VHA in his own right for his own rank of Major. On September 10, 1986, Headquarters, U.S. Air Force, Mr. Richard L. Burton, Military Pay Entitlements & Systems Branch, Denver, CO 80279-5000 "returned the claim without action" based on attached le-

gal opinion of Headquarters, U.S. Air Force (AFAFC/JAC), Mr. Donald G. Musselman, Chief, Active Duty Fiscal Law Division, Office of the Staff Judge Advocate.

12. On August 27, 1987, Judy Ponder filed a request for the U.S. Air Force to correct false "Personal Statements of Military Compensation" because the Statements indicated that the two members were receiving the value of BAQ or in-kind quarters each in his/her own right, independently of each other, when in fact they were not. On or about January 23, 1988, Headquarters, U.S. Air Force, denied the request, stating that "[The statement] complies with the intent of Congress ... member-married-to-member are residing in military quarters the government essentially values at two BAQs." The reply did not distinguish "with-dependant" from "without-dependant" BAQ values.

13. On January 7, 1988, Judy Ponder formally suggested to the U.S. Air Force that the government pay BAQ to the second member of the class of dual-member couples, thereby saving VHA costs to the government. On May 5, 1989, the U.S. Air Force denied the suggestion based on its interpretation that such action was contrary to law.

14. Defendant's policy as herein described as an adverse disparate impact upon women in the military service of the United States. Women in military service constitute approximately ten percent of all people in military service, while approximately one-half the persons affected by this policy are female military.

15. Judy Ponder was separated from active duty on August 30, 1990, and Joseph Ponder was separated from active duty on March 30, 1990. Plaintiffs completed the move to their current home in February of 1993.

16. The Plaintiffs' appeal of the actions of the Defendant to the U.S. Comptroller General was received on April 1, 1994. The Comptroller General Claims Group issued a denial on July 12, 1993. The Plaintiffs' August 12, 1993 appeal to the Comptroller General, Claim #B–254646, was denied by Robert P. Murphy, Acting General Counsel, by

letter dated March 4, 1994, sent by regular mail, postmarked April 4, 1994, and received by Plaintiffs on April 7, 1994. The denial letter did not specify that the denial was final, to what office if any Plaintiffs could appeal, or any time limit for appeal. Plaintiffs have exhausted their administrative remedies.

COUNT ONE

Deprivation of Rights to Regular Military Compensation ("RMC") Benefits Under 37 U.S.C. § 403 Without Due Process in Violation of U.S. Const., Amendment V

17. Plaintiffs adopt and incorporate the allegations of paragraphs 1 through 16 as fully as if set forth herein.

18. Acting under color of federal law, from August 29, 1985, through March 31, 1990, Defendant deprived Joseph Ponder of his right to BAQ and VHA or in-kind housing in his own right in violation of his right to due process under the United States Constitution, Amdt. V.

19. Acting under the color of federal law, from August 27, 1987, to August 30, 1990, Defendant deprived Joseph Ponder of his right to a correct and accurate annual Personal Statement of Military Compensation, in accordance with 37 U.S.C. §403, all in violation of his right to due process under the United States Constitution, Amdt. V.

20. Acting under color of federal law, Defendant, from August 27, 1987, to August 30, 1990, deprived Judy Ponder of her right to a correct and accurate annual Personal Statement of Military Compensation, in accordance with 37 U.S.C. §403, all in violation of her right to due process under the United States Constitution, Amdt. V.

21. Acting under color of federal law, from August 29, 1985, through March 31, 1990, Defendant deprived Judy L. Ponder of her right to RMC, BAQ, or in-kind housing at her rank and dependency status without impact to her spouse's compensation in his own right.

COUNT TWO

Conspiracy to Deprive Plaintiffs of Rights to Military Benefits Under 37 U.S.C. § 403 Without Due Process in

Violation of U.S. Const., Amendment V

22. Plaintiffs adopt and incorporate the allegations of paragraphs 1 through 21 as fully as if set forth herein.

23. Acting under color of federal law, Defendant, from on or before August 29, 1985, through March 31, 1990, conspired to deprive Joseph Ponder of his right to BAQ and VHA or in-kind housing in his own right in violation of his right to due process under under the United States Constitution, Amdt. V.

24. Acting under color of federal law, Defendant, from February 1, 1986, to February 1, 1990, conspired to deprive Joseph Ponder of his right to a correct and accurate annual Personal Statement of Military Compensation, in accordance with 37 U.S.C. §403, all in violation of his right to due process under the United States Constitution, Amdt. V.

25. Acting under color of federal law, Defendant, from February 1, 1986, to February 1, 1990, conspired to deprive Judy Ponder of her right to a correct and accurate annual Personal Statement of Military Compensation, in accordance with 37 U.S.C. §403, all in violation of her right to due process under the United States Constitution, Amdt. V.

WHEREFORE, Plaintiffs pray the following relief:

1. Declaratory judgements:

a. That the procedures of the Defendant precluding the determination of housing compensation of a "second" military spouse based on his or her rank, independently of the "first" spouse, be declared void as a violation of Constitutional guarantees of due process.

b. That the Court declare 37 U.S.C. §403 (a) (which states that no member in government housing shall receive BAQ or VHA) unconstitutional as it violates members' constitutional right to due process, as compared to other two-wage earning families in government quarters.

c. That 37 U.S.C. §403 (a) provides a statutory entitlement to every active duty member of the U.S. Armed

Forces, in his or her own right, BAQ or in-kind housing; and that each member's regular military compensation, including the BAQ provision, shall be determined and paid independently of what is paid or provided to any military spouse, not withstanding the provision that only one member may claim the first set of dependents for housing allowance purposes.

2. Injunctive relief as follows:

(a) The Defendant be enjoined from denying compensation of a "second" military spouse housing compensation, including BAQ and VHA, independently from a "first" military spouse when both are residing with dependents in government housing, on the basis that only on of the two wage earning service persons persons married to one another may receive housing entitlement or compensation.

(b) That Defendant cease and desist from issuing "Personal Statements of Military Compensation" to service persons married to other service persons when both are residing with dependents in government housing, which statements declare that the "second" member is receiving the value of BAQ, or VHA, when, in fact, such member was not receiving such stated value.

3. Equitable relief and money damages as follows:

a. Award of past due compensation in the form of without dependent rate BAQ and VHA to the Plaintiff, Joseph T. Ponder, for the rank of Major and Lieutenant Colonel in the amount effective during the period of claim in the sum of $21,131.57, plus such additional sums as the proof may show, plus interest at the applicable government rates effective during the period of claim.

b. Judgement on behalf of both Plaintiffs in the form of issuance of corrected "Personal Statements of Military Compensation" for the period 1985-1990;

c. Attorneys fees and costs of this action.

d. All other relief to which the Plaintiffs may appear entitled.

Respectfully submitted,

/s/ John E. Spainhour
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[LETTER OF REQUEST DATED MAR. 24, 1986]

FROM: LT COL JOSEPH T. PONDER, 464-74-2763
1514 March Drive
Grand Forks AFB, ND 58205
(701) Home: 594-2370, Duty: 594-6545/6571

Subj: REQUEST FOR BAQ WHILE OCCUPYING INADEQUATE GOVT FAMILY QUARTERS

To: 321SMW/AC

1. REQUEST you take action to have THE DOD MILITARY PAY AND ALLOWANCES ENTITLEMENTS MANUAL (DODPM), CHANGED to limit a two-member family's forfeiture of basic allowance for quarters (BAQ) upon occupancy of government family quarters to only one BAQ at the with-dependant rate, and to allow the other member to retain their statutory right to either BAQ at the without-dependent rate or government single quarters. This will merely provide on-base quarters entitlements consistent with current off-base quarters entitlements. The following rationale applies:

a. The government benefits more when military members reside in government quarters than in off-base quarters a substantial distance from the work place. (See Atch 1)

b. The amount of BAQ and VHA opportunity income which two-military members forfeit is unreasonable for the benefit derived (fair rental value) of government family quarters. (See Atch 2)

c. Government family quarters, as a substantially less value than the off-base quarters which two-member families are entitled with two BAQs (See Atch 3), should be declared inadequate for two-member families. (See Atch 4)

d. It is inequitable to require two-member families to forfeit substantially more opportunity income than one-member families. (See Atch 5)

2. Request government housing regulations also be changed to to allow the two-member family the choice as

to which spouse will apply for and forfeit their BAQ and VHA when occupying government family quarters in their own right.

3. Request that I be paid without-dependent rate BAQ retroactive to 1 Sep 1985 when I first occupied government quarters with my wife who was, and is, already entitled to the same in her own right.

/s/ JOSEPH T. PONDER, LtCol, USAF
464-74-2763

See attachments

ATTACHMENT 1

CURRENT POLICY POLICY DISADVANTAGES TO GOVERNMENT

1. The current interpretation of housing entitlements for military married to military (double the value off base than on base) encourages these members to reside off base. It also consequently inhibits devotion to duty and productivity as follows:

a. When the off-base quarters is a substantially longer distance from their work location than would be on-base quarters at the same installation, members living off base generally:

(1) Have less time to devote to the job than those who live on base. Duty days of active duty members are considered to be "24-hours-a-day," but practically speaking, the actual maximum potential amount of time which members may devote to duty during any given day must be decreased by the amount of time which they must travel to plus from their quarters. In many areas, this travel time is often as much as one to three hours round trip. When the off-base housing is 1/2 hour hour away from the military installation and adjacent government quarters, one hour is taken away from the normal off-duty hours which the members could otherwise devote to the job. And thus, the more members the government can house on base per unit, the more potential productivity the government can obtain.

(2) Are less productive in that they have less opportunity to participate in military community activities.

(3) Are slower in responding to emergency recalls after normal duty hours.

b. Conversely, when the two-military family, because of circumstances of the particular work and geographical assignment, end up occupying government family quarters and forfeiting a substantially larger opportunity income (BAQ) than the one-member family, they perceive a defi-

nite financial discrimination. This will most likely decrease job motivation by increasing the incentive to be extremely mobile; i.e., to be preoccupied with getting out of the undesirable situation at hand as fast as possible and moving to a location where adequate off-base quarters are in fact available and practical within duty hour constraints.

2. When housing one-member families in government family quarters, the government collects only one VHA, as compared to the two VHAs which could be collected if a two-member family were to reside in the same government quarters.

3. Current BAQ rules for military members married to military members are excessively complicated. Entitlements and rulings address numerous scenarios, such as divorced or separated members, remarriages, separation of one class of dependents per family, custody vs child support cases, on and on. A substantial amount of government manpower is consequently used in training finance personnel and in turn the individual members and their individual personal circumstances. Like the test "flat-rate per diem", BAQ entitlements could be simply stated that "two-member families are entitled to one with two-dependent rate BAQ or govt family quarters, plus one without-dependent rate BAQ or government single quarters, and the individual members may decide (or courts if they cannot agree) which entitlement options they will receive in their own rights.

ATTACHMENT 2

TWO BAQs FORFEITED BY
TWO-MEMBER FAMILIES:
AN UNREASONABLE AMOUNT
FOR THE BENEFITS DERIVED

1. The fair rental value (Aprox $400 per month) of my government family quarters is substantially less than—aprx only 36% of the value of—the two BAQs and VHAs (aprx $1149) which we forfeit.

2. Our monthly $1149 forfeiture BAQ & VHA per month would pay for the out-right purchase of the government family quarters valued at $62,000 in only 6 to 6 1/2 years (based upon 10 to 12% interest rates). This length of loan payback period is considered not only extremely accelerated, but also in the extreme minority of the market, while the majority of loans are for 25 to 30 years.

3. Another way of pricing the purchase of the government family quarters valued at $62,000 would be for the amortization of a loan over the normal 30-year loan payback period. At again an interest rate of 10 to 12%, our monthly $1149 BAQ & VHA forfeiture is an unreasonable 211 to 180% of what the (principleand interest) payments would be ($544 to $638).

4. The BAQ & VHA opportunity income forfeited by a two-member family is a substantial amount of total potential compensation. For example, the $1149 which my family forfeits is a substantial 16% of our potential total compensation (basic pay, BAQ, VHA). My requested without-dependent rate BAQ of $479 is a much lessor value—only 6.6% of our potential total compensation.

ATTACHMENT 3
EVIDENCE THAT GOVERNMENT FAMILY QUARTERS ARE SUBSTANTIALLY LESS VALUE THAN OFF-BASE QUARTERS ACQUIRED WITH TWO BAQs

The value of government family quarters generally is substantially more than the value of merely one with-dependent rate BAQ. (56 Comp Gen 894) However, the value of government family quarters generally is substantially less than the value of the TWO BAQs (one with- plus one without-dependent rate) as two-member families are entitled off-base. In my family's housing history of receiving two BAQ and VHA allowances for about the past ten years, the government family quarters which we now occupy are a substantially less value as follows:

1. Its 1200 sq ft is substantially less space. It is not even half of the space in which my family has lived the past ten years as follows:

Percentage of Previous Off-Base Quarters

Time Period	Finished Space	Total Space*
AUG 1983 to JUL 1985	28%	26%
JUN 1980 to AUG 1983	51%	48%
SEP 1976 to JUN 1980	32%	44%

2. Its dramatically reduced space has forced us to commercially store aprx one-fourth of our household goods worth aprx $100,000. in facilities without heating or humidifiers in the winter (in apx 30-degrees-below-zero temperatures) and no air-conditioning in the summer (in aprx 100-plus temperatures). We, thereby, are forced into a severe damage risk, never to be reimbursed in its true value by the government, not to speak of depreciation and obsolescence for items which we cannot use during its normal lifespan. We have also been forced to store a second

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*Includes garage and unfinished basement area.

one-fourth of our goods in the basement of our governmentfamily quarters, using the entire space from floor to ceiling and wall to wall, and consequently not only do not have access to another one-fourth of our goods, but also that much less potential living space than the one-member family with less goods. A third one-fourth of out goods remain unshipped in the unsold home at the previous assignment; upon sale or renting of that home, these goods too will have to be put into commercial storage because there is absolutely no room available in the presently occupied government family quarters.

3. Its estimated $62,000 value is only about 52% of the $120,000 value of one quarters in which we lived off base from Jun 1980 to Aug 1983 and about 30% of the $206,000 value of the quarters in which we lived off base from Aug 1983 to Jul 1985. Furthermore, the $62,000 value assigned to the government family quarters by the base Housing Office appears to be overrated. (See Exhibit 4) (This is especially unpalatable having to pay aprx twice the price (two BAQs) for the same government quarters than that one BAQ the one-member family.) Consequently, it has much less amenities and many more deficiencies than the (off-base) quarters to which we were accustomed. (See Exhibit 2)

ATTACHMENT 4

SUBSTANTIALLY LESS VALUE
GOVT FAMILY QUARTERS:
INADEQUATE FOR TWO-MEMBER FAMILIES

37 U.S.C. 403 (1976) entitles every member the statutory right to either BAQ or government quarters appropriate to their rank, grade, or rating, and ADEQUATE for themselves and their dependents. (56 Comp Gen 46,48 (1976)) And when adequate quarters are not provided, each member is entitled to without-dependent rate BAQ. (48 Comp Gen 68 (1968)) interpeting 42 U.S.C. 1594J (A)) QUARTERS PROVIDED TO ME AND MY FAMILY ARE INADEQUATE AND/OR INAPPROPRIATE TO MY AND MY WIFE'S RANKS, GRADES, AND RATING as follows:

1. Quarters considered adequate for a family with one working spouse are not normally considered adequate not appropriate for two working spouses with comparable salaries or similar ranks. The U.S. Supreme Court recognized this for off-base quarters, and entitled two military members living off-base to two BAQs (one with- plus one without- dependent rate) which is nearly double the value of quarters provided to a one-member household. (Frontiero v Richardson 411 U.S. 677 (1973)) Consequently, the higher a family's income, the higher the value of quarters which they acquire off-base, or the more income they have for other priorities.

2. Under the Pay and Allowances System for members of the uniformed services, either housing in kind is provided or an allowance for housing (BAQ) is paid. Housing provided must be adequate. I hold that housing should be designated INADEQUATE when members forfeit an unreasonable amount for the benefit derived. (See Atch 2)

3. The government family quarters provided to me and my wife are INADEQUATE as compared to that which the two of us could obtain, each in our own rights, in off-base quarters through BAQ and VHA. (See Atch 3)

4. When two-member families occupy government family quarters designated as inadequate and pay rent instead of forfeiting BAQ and VHA, both members may occupy the housing without loss of either BAQ AND at a greater combined BAQ than the one-member family. (See Public Law 89-568, 80 Stat 753.)

5. In B137089, Aug 27, 1958 when a captain and his civilian employee wife were assigned two government single quarters, he was considered to have been assigned inadequate quarters and was authorized with-dependent rate BAQ retroactive to when he and she were first assigned those quarters.

ATTACHMENT 5

REASONS WHY INEQUITABLE TO CHARGE TWO-MEMBER FAMILIES "DOUBLE RENT"

Housing and military pay regulations required me to forfeit BAQ upon occupancy of government family quarters with my wife. My wife, Major Judy L. Ponder, 433-80-2504, also occupying the same quarters, is already entitled to such in her own right while claiming our child as her dependent. She is also entitled to the type of quarters classified as field-grade officer housing. I hold that these regulations are unconstitutional and unequitable. (Public Law 93-64, July 9, 1973, 87 Stat) The following rationale applies:

1. The purpose of the 1949 Career Compensation Act, Ch 681, 63 Stat 802, 812, Sec 302, including the BAQ provision, was to attract career personnel through a scheme of fringe benefits on a competitive basis with industry. This should mean that the two-member family providing the government double labor/manpower is entitled to double compensation, including housing benefits. The currently required forfeiture of BAQ opportunity income by two-member families, in an amount nearly double to that of the one-member family, is not consistent with the stated Act's purpose.

2. I, as a member of the uniformed services entitled to basic pay and basic allowance for subsistence (BAS) in my own right, and not afforded separate government quarters in my own right, hold that I SHOULD BE ENTITLED TO WITHOUT-DEPENDENT RATE BAQ IN MY OWN RIGHT.

3. Such is the current interpretation for off-base quarters. The 1973 U.S. Supreme Court decision in Frontiero v Richardson 411 U.S. 677 in effect superceded 34 Comp Gen 113 (1954) interpreting the 1949 Career Compensation Act. They, in effect, ruled it unconstitutional and inequitable to restrict the BAQ entitlements to only one member per family occupying one off-base family quarters

and/or to prohibit female members to receive BAQ in their own right when residing in off-base quarters with a military husband. They also declared it unconstitutional to require female members to prove a dependency in order to become entitled to BAQ in their own right. They instead INCREASED BAQ ENTITLEMENTS for two-member families who claim dependent(s) FROM ONE BAQ at the with-dependent rate to TWO BAQs—one at the with-dependent rate and one at the without-dependent rate.

4. When one member elects to occupy government family quarters with dependent(s), he or she is receiving quarters supposedly equivalent to that which he or she is entitled off-base. I hold that the other member should be entitled to the additional value to which they would be additionally entitled off-base in their own right; that is, without-dependent rate BAQ or government single quarters.

5. The two-member family is required to forfeit substantially more BAQ opportunity income (nearly double: two BAQs—one with- plus one without-dependent rate) than that their cohort one-member family for the same on-base quarters benefit. This is inequitable because:

a. The one-member family has the advantage of increased opportunity to obtain a second family income and fringe benefits of a full-time civil-service or civilian industry job outside the uniformed services, and they are not required to forfeit any of their "second-spouse" supplemental income when occupying government quarters. In effect, the one-member family's civilian spouse and/or children are receiving government family quarters on a free basis while the second spouse of a two-member family is not. Furthermore, the equivalent typical civilian income is for only a 40-hour work week, whereas the military works "24 hours per day." So to acquire government family quarters, the two-member family is very likely to be GIVING the government more than TWICE THE LABOR AND FORFEITING to the government nearly TWICE THE BAQ opportunity income than the one-member family.

b. Two-member families when being reassigned in a Joined Spouse Assignment normally move concurrently. As such, they do not have the option to schedule movement of the second spouse around the location of a buyer and closing the sale of a home. They cannot leave behind a civilian spouse in an unsold home at the location of the previous assignment location who can continue to:

(1) Be entitled to BAQ and VHA at the with-dependent rate—while the military member at the new assignment location is ADDITIONALLY entitled to FREE "Class-B Bachelor" government single quarters. While a one-member family may be entitled to both off-base family quarters (BAQ at with-dependent rate) and government single quarters, the two-member family is entitled to only one set of government family quarters while paying expenses of an unsold home, equalling double jeopardy in housing expenses. For example, the one-member (Major) family could be forfeiting $598.93 for TWO sets of field-grade government quarters (one family plus one single) while the two-member family (LtCol and Major) is forfeiting a substantially larger $1149.57 for ONE set of family quarters.

(2) Care for and maintain the home in a special way that only a homeowner does for their own home, and at much less the expense than if hiring out maintenance through a realtor; and

(3) Give personal attention to selling the home over and above what realtors may do, and possibly save a healthy 6 to 7% realtor commission, amounting to $5600 to $8750 on a $80,000 to $125,000 sales price.

c. The one-member family uses substantially more utilities in government family quarters than does the two-member family. While the two-member family does not, the one-member family often has a spouse who does not work outside the home, lives in the quarters during duty hours, provides child care for non-school age dependents during duty hours, and for their school-age dependents during after-school hours.

6. The government is having its cake and eating it too, inconsistently interpreting housing rules to its own advantage instead of its military members married to other military members.

a. Two members may not claim the same dependents for BAQ purposes in order to become entitled to two with-dependent rate BAQs. Only one member is entitled to a with-dependent rate BAQ on account of two members' common dependents. (51 Comp Gen 413 (1972)) and 54 Comp Gen 665 (1975)) The same rationale should apply in reverse in government family quarters: both members should not be required to claim the same dependent(s) in order to forfeit two BAQs.

b. In almost all, if not all, other circumstances, these members are treated as members in their own right—in terms of both compensation (equal pay for equal work) and expected employee business expenses. For example:

(1) REASSIGNMENTS: Because two-member families have double risk of being relocated (due to two members instead of one being vulnerable to receive PCS orders, they have double financial risk when owning off-base family quarters than do one-member families. In our case, we have had an aprx $70,000 deficit (difference in off-base BAQ income vs housing expenses) due to three PCS moves in the past five and one-half years; all with different circumstances except for the common fact that the government's requirements forced us to incur expenses for two houses at once. (See Exhibit 2)

(2) FAMILY SEPARATIONS: Two-member families have double the risk of being geographically separated due to the needs of the military, and thus double risk of being required to maintain two separate households in separate houses. (See Exhibit 1, PCS Move #2) This creates a hardship for the two-member family moreso than the one-member family as follows: The two member family:

(a) May have to invest in double household goods and thus require nearly double the square footage. (See Exhibit 1, PCS #2; Atch 3, Para 2)

(b) Homeowners could find themselves in double jeopardy. After being required to acquire double housing, they could also be subsequently have to spend their energies selling two sets of quarters simultaneously instead of the one set of quarters lived in by the one-member family. (See Exhibit 1, PCS Moves # 2 & #3)

(c) When they have been unsuccessful in selling homes at previous assignment locations and have to continue house payments for empty homes, triple jeopardy hits if the two-member couple is assigned government family quarters at the new installation and is required to forfeit an unreasonable amount for those quarters, too. (See Exhibit 1, PCS Move #3)

c. DOUBLE EMPLOYEE BUSINESS EXPENSES: The two-member family incurs double normal expenses for government employment than the one-member; this could mean aprx $12,172/yr for the two-member family vs $6068/yr for the one-member family. (See Exhibit 3)

7. 58 Comp Gen 100 and 45 Comp Gen 146 decisions provided that when one spouse is furnished government family quarters, the other spouse, if quartered separately, is entitled to government single quarters or BAQ at the without-dependant rate. Both members retained heir stautory rights either to adequate quarters or to BAQ. Separation did not effect this entitlement to BAQ when the member with custody of dependents is assigned to government family quarters and the member paying support is not.

8. A one- or a two-member family could be entitled to TWO sets of government family quarters under certain conditions, such as when both military spouses are geographically or legally separated and have dependent children residing with them, or when one military spouse is reassigned with dependents and leaves the other military spouse in the first government family quarters until his/her assignment. This is a combined higher value than the herein requested one government family quarters plus one without-dependent BAQ.

1 Aug. 1985 to 31 Mar. 1986

*EXPENSES: 2814 Century Road $10,617.66
BAQ INCOME 0.00
DIFFERENCE: ..... ($10.617.66) to Date

NET TOTAL DIFFERENCE IN EXPENSES
vs INCOME

PAST 5 1/2 YEARS: ..... ($69.403.26) To Date

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*Includes closing costs, home loan payments (principle, interest), taxes, insurance, utilities, upkeep expenses when home is not occupied or that otherwise would not be incurred while living in government quarters, lost opportunity income from down payment, minus rent collected from tenants. Does not include profit or loss due to sales, because that amount only reflects in retrospect the good or bad luck and the wiseness of investment resulting from the risk taken.

EXHIBIT 2

ABSENT AMENITIES IN GOVERNMENT FAMILY QUARTERS

No air conditioning, Central nor window-type

No carpet, much less a top-of-the-line quality

No patio, porch, or Deck Between Back Door & Back Yard

No double oven

No light over stove

No recessed lighting under top kitchen cabinets

No no-wax kitchen floors

No Icemaker in refrigerator

Oven is not self-cleaning

No decorative backsplash for kitchen counter

No ceiling chandaliers, much less any light fixtures worth over $20.00

No Water Softener

No Woodburning Fireplace

No built-in Bookcases

All walls are stark white; no decorative wallpaper; no paneling

No decorative woodwork such as sconces, ceiling beams, wainscotting, chair rails, recessed ceiling molding

No access to attic storage

No window coverings such as drapes or blinds

No built-in make-up vanity/dresser

No decorative and functional ceiling fans

No Laundry Wash Basin

No Laundry Room Cabinets/Shelves

No Built-in Bar

One-car instead of two-car garage

No Garage Door Opener

Garage walls not finished; no garage shelves

No Shower Door For Master Bath Shower Stall

No Cabinets or closets in bathrooms

No heat lamps in bathrooms

DEFICIENCIES IN
GOVERNMENT FAMILY QUARTERS

Absence of a noise barrier from neighbors; i.e., paper-thin wall separating duplex units; severely restricting the level of noise which one may generage without burdening the neighbors, and increasing disturbances from neighbors.

Unsightly front yard appearance/inconvenient access to front door due to heavy wires being connected from the top of a street telephone pole 30 feet to the ground three feet from the front door

Excessive pedestrian traffic susceptible to breaking in and entering/burglaries due to being located near an unguarded installation entrance/exit

Sinks in bathroom are single, stand-alone porcelain-type with open space underneath, instead of simulated marble double sinks built into finished cabinets with shelves inside.

Dishwasher is basic model; i.e., no built-in crystal cycle or rinsing agent dispenser.

Fixtures (kitchen cabinet drawer and door pulls, shower rods, towel bars, door knobs/locks, faucet & faucet knobs) are the cheapest quality available

Bathroom medicine cabinets above sinks have cheap-looking 1/2 metal rim around mirror door instead of a more decorative type, such as imitation wood or gold-painted plastic design

Bathroom wall tile is a low-demand pink color, old-fashioned easy-to-water-spot type

Fan above stove is excessively noisy

EXHIBIT 3

EMPLOYEE BUSINESS EXPENSES: MILITARY MARRIED TO MILITARY

1. Double NCO or Officers Club dues. At my base, Officers Club dues is $156/year for the one-member family versus $312/yr for the two-member family. Furthermore, the frequent 2-for-1 specials are in effect a lessor value to the two-member family because the free second meal is for a spouse who is paying a full dues while the one-member family's spouse is not. (AFR 215-11, Para 7e)

2. Expected participation in double after-duty hour activities when their respective units are not the same. While both husband and wife of the one-member family often both go to these together, the 2-member family has double the number of activities to go to. This could mean an average with babysitter expenses (Aprx $35/night X 4 nights/mo = $3360/year for the two member family vs $1680/yr for the one-member.

3. Double donations for official fund raising drives such as the Combined Federal Campaign (CFC) and the Air Force Assistance Fund (AFAF). For example, this could mean aprx $300 for a one-member family vs $600/yr for a two-member family.

4. Double expenses in misc office people-oriented funds such as going-away gifts, flowers for hospital or funerals, baby & wedding gifts, birthday cake funds, secretary luncheons/gifts. This could mean for two members, with the same size office and same spirit of giving, a difference of aprx $200/yr for a one-member family vs $400/yr for the two-member family.

5. Double normal employment expenses; i.e., automobile expenses to go to & from work when carpooling is not feasible, uniforms, etc. With an aprx $300/mo car expenses, $75/mo uniforms, and $75/mo automobile gas, this could mean aprx $5400 for the one-member family vs $10,800/yr for the two-member family.

B16E3

★TABLE 3-2-4

BAQ ENTITLEMENT AT PERMANENT STATIONS FOR SPOUSES IN UNIFORMED SERVICE—FAMILY-TYPE QUARTERS NOT ASSIGNED (Notes 1–7 and Note 16)

	A	B	C	D		E		F	
RULE	When member A has dependents other than spouse	and member B has dependents other than spouse	and members acquire a child(ren) (note 8)	and single-type government quarters are assigned to (note 9)		then member A is entitled to BAQ as a member		★ and member B is entitled to BAQ as a member (note 15)	
				member A	member B	with dependent	without dependent (notes 11 & 13)	with dependent	without dependent (notes 11 & 13)
1	No	No	No				X		X
2	No	No	No	X	X				
3	No	No	No	X					X
4	No	No	No		X		X		
5	No	No	Yes			X (note 10)			X
6	No	No	Yes	X	X	X (note 10)			
7	No	No	Yes	X		X (note 10)			X
8	No	No	Yes		X	X (note 10)			
9	Yes	No	No			X (note 12)			X
10	Yes	No	No	X	X	X (note 12)			
11	Yes	No	No	X		X (note 12)			X

TABLE 3-2-4—Continued

12	Yes	No	No		X	X *(note 13)*			
13	Yes	No	Yes			X			X
14	Yes	No	Yes	X	X	X			
15	Yes	No	Yes	X		X			X
16	Yes	No	Yes		X	X			
★17	Yes	Yes	No			X (note 15)			X
18	Yes	Yes	No	X	X	X		X	
19	Yes	Yes	No	X		X		X	
20	Yes	Yes	No		X	X		X	
★21	Yes	Yes	Yes			X (note 15)			X
22	Yes	Yes	Yes	X	X	X		X	
23	Yes	Yes	Yes	X		X		X	
24	Yes	Yes	Yes		X	X		X	

NOTES:

1. When family-type quarters are jointly occupied by the members, neither member is entitled to BAQ, even though the dependents do not reside in the quarters, unless dependents are prevented by military orders from occupying quarters.

2. Rules 1–16, 18–20, and 22–24 apply equally whether or not members are assigned to the same or adjacent bases or shore installations.

3. When husband-wife members are stationed at the same or adjacent military installations, both members are normally authorized BAQ at the appropriate rate when family-type quarters are not assigned, notwithstanding the availability of adequate single quarters for either or both members.

4. Members may be considered to be stationed at the same or adjacent bases or shore installations when they are not precluded by distance from living together, or they actually commute on a regular basis, regardless of distance.

5. When husband-wife members have no other dependents and are precluded by distance from living together, they will normally be treated as members without dependents for purposes of entitlement to BAQ (see table 3–2–3).

6. When husband-wife members, who are both entitled to BAQ at the same or adjacent military installation, are geographically separated by competent orders and one member remains assigned to the old duty station, that member will normally be authorized continuance of BAQ notwithstanding the availability of adequate single quarters for assignment to either member.

7. BAQ at the rate payable to members without dependents is authorized during travel status after departure from the old permanent station, or during a period of leave, delay en route, or proceed time between permanent duty stations, provided the members are in pay grade E-4

(4 year's or more service), and above, are not in receipt of BAQ for other dependents, and are not assigned to government quarters en route or temporarily occupy government quarters for more than 30 days at any one location.

8. When not assigned to government quarters at a permanent station, BAQ accrues for up to 7 consecutive days at one location where government quarters are temporarily occupied while in a duty or authorized leave status not incident to PCS. BAQ for a 7-day period is not forfeited if occupancy exceeds 7 days.

9. Refer to paragraph 30232.

10. If either column in column D is blank, that member is not assigned to single-type government quarters.

11. For purposes of this table, the members have agreed that member A is to receive BAQ at the with dependents rate (paragraph 30232a).

12. See table 3–2–3, DODPM, for BAQ entitlement when a member is on field or sea duty.

13. When the dependents in column A, rules 9 through 12, are children from a prior marriage or illegitimate children residing with member A, the members may elect for member B to receive BAQ for stepchildren, in accordance with subparagraph 30239b, and member A to receive without dependents rate BAQ when not occupying single quarters.

14. When one member enters a non-pay status, the other member may claim the member not entitled to pay and allowances as a dependent and be authorized to draw BAQ at the with dependent rate for the duration of the non-pay status if otherwise entitled (for exception see paragraph 30241).

15. Members must elect which one is to receive the with-dependent rate BAQ. If they cannot agree as to the election, the entitlement will rest with the senior member. Elections cannot be retroactive.

16. When one or both of the dependents in columns A and B are dependent parents of the members, or the mem-

bers no longer share a common residence due to military orders, both members may receive with-dependent rate BAQ. The residence of dependent children is not for consideration. Refer to paragraphs 30236 and 30236.1 for BAQ entitlement of divorced or legally separated members.

17. Members may temporarily occupy government quarters assigned to another member for 90 days or less at any one duty station without loss of BAQ. Occupancy for more than 90 days is considered to be of a permanent nature and BAQ entitlement does not accrue for any portion of the period of occupancy. Movement from one unit of quarters to another or in and out of the same unit, with or without a break, does not establish a new 90-day period.